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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

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WILLIAM DUANE ELLEDGE,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

==========

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

Whether the outcome determinative test is an appropriate measure of prejudice in the analysis of a claim of the denial of the Sixth Amendment right to effective assistance of counsel, where that claim is based upon counsel's substantial failure to investigate compelling mitigating circumstances due to the trial court's failure to allow sufficient time for preparation?

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AUTHORITIES CITED

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States. It further involves Section 921.141, Florida Statutes (1977), entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence." Because of its length, the statute is set out in its entirety at Appendix C.

STATEMENT OF THE CASE

Petitioner was charged by indictment with the rape and first degree murder of Margaret Strack. On March 17, 1975, following denial of his motions to suppress custodial statements, petitioner pled guilty to both offenses and was so adjudged. A sentencing trial was held, at the conclusion of which the jury recommended death. The sentencing judge sentenced petitioner to death for first degree murder and fifty years imprisonment for rape.

Thereafter, petitioner appealed his conviction and sentence to the Supreme Court of Florida, which affirmed the conviction but reversed the death sentence and remanded for a new sentencing. Elledge v. State, 346 So.2d 998 (Fla. 1977).

Immediately prior to commencement of the resentencing proceeding, counsel moved for a continuance. The motion was denied, the resentencing proceeded and petitioner was again sentenced to death. The Florida Supreme Court affirmed the sentence. Elledge v. State, 408 So.2d 1021 (Fla. 1982). After denial of rehearing, a petition for writ of certiorari was filed with this Court. That petition was denied, Elledge v. Florida, ___ U.S.___, 103 S. Ct. 316 (1982), and rehearing was denied on January 10, 1983,___U.S.___, 51 U.S.L.W. 3510 (1983).

On January 25, 1983, executive clemency proceedings were held before the Governor and Cabinet. On February 15, 1983 the Governor signed a death warrant ordering petitioner's execution between noon March 11, 1983 and noon March 18, 1983. Petitioner's execution was scheduled for 7:00 a.m., March 15, 1983.

Petitioner then commenced the post-conviction proceedings which have led to the petition filed with the Court today. Petitioner filed a motion to vacate judgment and death sentence

No. ____

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WILLIAM DUANE ELLEDGE,
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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner prays that the writ of certiorari issue to review the judgment of the Florida Supreme Court filed March 10, 1983, upon which rehearing was denied on June 22, 1983.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida which is the subject of this petition is reported as Elledge v. Graham, 432 So.2d 35 (Fla. 1983) and is set out as Appendix A to this petition. Rehearing with respect to this opinion was denied, and the order denying rehearing is attached as Appendix B to this petition.

JURISDICTION

The judgment of the Supreme Court of Florida was filed on March 10, 1983, and petitioner's timely motion for rehearing was denied on June 22, 1983. The Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States, granted petitioner an extension of time until September 20, 1983, to file this petition for writ of certiorari. Jurisdiction of this Court is invoked pursuant to 28 U.S.C §1257(3), petitioner having asserted below and asserting herein the deprivation of rights secured to him by the Constitution of the United States.

pursuant to Fla.R.Crim.P. 3.850 in the trial court, along with an application for stay of execution. An evidentiary hearing was held on March 9, 1983 with respect to petitioner's claim that his counsel during resentencing had rendered ineffective assistance. The trial court issued an order on March 10, 1983 denying the motion to vacate judgment and sentence and denying the application for stay of execution.

Following denial of his appeal to the Florida Supreme Court, Elledge v. Graham, 433 So.2d 35 (Fla. 1983), petitioner timely filed in this Court for certiorari review.

STATEMENT OF THE FACTS

This case involves the death of Margaret Strack in petitioner's apartment after an alleged rape on August 26, 1974. Ms. Strack first met Mr. Elledge in a bar in Hollywood, Florida. After talking and drinking for a while with Mr. Elledge, Ms. Strack voluntarily accompanied him to his nearby apartment, where they continued drinking and began to smoke marijuana. Ms. Strack then undressed and initiated sexual activity with Mr. Elledge. When Mr. Elledge began to respond to Ms. Strack's overtures, however, Ms. Strack refused to continue. At that moment, Mr. Elledge "freaked out" and while in such a state choked Ms. Strack, forcing her to engage in intercourse. (Transcript of Guilty Pleas Proceedings, March 17, 1975, at 13) While Mr. Elledge was still in this mental and emotional state, Ms. Strack again resisted him, and he "just kind of blacked out, and lost all control of what [he] was doing" and choked Ms. Strack until he realized, some time later, that she was dead. (Ibid.)

At the hearing on his post-conviction motion to vacate, Mr. Elledge claimed that he was denied the effective assistance of counsel at resentencing because of counsel's substantial inability to prepare for the proceeding. Mr. Elledge claimed that counsel's inability was caused by the court's denial of a continuance; counsel thus failed to prepare for trial through no strategic choice but rather through the interference of the state. The evidence adduced in support of this claim overwhelmingly demonstrated that as a result of this court-imposed lack of preparation, petitioner, not unlike the petitioners in

Powell v. Alabama, 287 U.S. 45, 69 (1932) was deprived of "the guiding hand of counsel at every step in the proceedings against him."

Two witnesses testified at the hearing on effective assistance. Robert McCain, petitioner's counsel for the trial and resentencing, discussed his theories of defense and his conversations with Mr. Elledge. His theory of defense prior to Mr. Elledge's guilty plea was essentially two-fold. The first was a plea of not guilty by reason of insanity, but when two court-appointed psychiatrists returned a report finding Mr. Elledge competent that defense was abandoned. The second defense was suppression of the custodial statements made by petitioner. When this motion was denied, the fall back defense was to enter a plea of guilty and "go to the mercy of the court." After the denial of the motion to suppress, he advised Mr. Elledge to plead guilty and the pleas were entered the same day.

Regarding the penalty trial, in 1977, Mr. McCain testified that he was definitely not prepared and that there were additional specific matters that he needed to investigate in order to properly represent Mr. Elledge. He testified that these matters related to petitioner's mental condition at the time of the offense, including the the fact that Elledge had been placed on "mind drugs" at the prison. Counsel testified that without a continuance, he was left with virtually no defense except for his client, in essence, saying what he said in the prior trial. Counsel had wanted to investigate the fact that Mr. Elledge was on Mellaril and an epilepsy drug while in prison and wanted to bring in several witnesses concerning Elledge's background. Mr. McCain said that he thought Elledge was "crazy" and thought that if he were able to investigate the psychiatric defense it would "bear fruit".

Mr. Elledge also testified at the hearing as to his conversations with Mr. McCain about the case. He consistently told Mr. McCain that at the time of the offense, he was "not in his right mind", "in a complete daze." He said that Mr. McCain advised him to plead guilty and "throw himself on the mercy of the court" after the competency issue had been decided and the

suppression had been denied. Mr. McCain did not discuss with him the elements of the offense or possible defenses prior to entry of the plea.

Prior to the 1977 sentencing trial, Mr. Elledge had been in the jail a week or two before he saw Mr. McCain. He saw Mr. McCain, only a few days before trial, as a result of Mr. Elledge's telephoning Mr. McCain, who had not known that Elledge had been returned to the Broward jail. He told Mr. McCain about having received drugs and psychiatric treatment in prison. Mr. McCain told him he was going to move for a continuance. The continuance was denied, and thus the only preparation was reading over his testimony of the first trial.

In addition to the testimony below, Mr. Elledge proffered certain testimony and records. A proffer was made of the report of Dr. Dorothy Otnow Lewis, M.D. as to her extensive evaluation of Mr. Elledge. Also proffered was the testimony of certain members of Elledge's family. The purpose of the proffer was to establish the evidence that would have been available had counsel been able to conduct an investigation.

The trial court reserved ruling on the motion, and then on March 10, 1983 issued his ruling denying the motion.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE WHETHER "OUTCOME-DETERMINATIVE" IS THE PROPER STANDARD FOR ANALYZING PREJUDICE RESULTING FROM THE DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN SUCH DENIAL IS CAUSED, AT LEAST IN PART, BY THE COURT'S REFUSAL TO ALLOW COUNSEL SUFFICIENT TIME TO INVESTIGATE COMPELLING EVIDENCE IN MITIGATION.

This petition presents the question of the proper standard for determining prejudice in the context of a capital sentencing proceeding where ineffective assistance of counsel results from judicial interference with the attorney-client relationship. This Court presently has before it the issue of the constitutional standards for judging claims of the denial of effective assistance of counsel when the state is blameless for the resulting ineffectiveness. See Strickland v. Washington, ___U.S.___, 51 U.S.L.W. 3865 (June 6, 1983) (No. 82-1554) [granting certiorari in Washington v. Strickland, 693 F.2d 1243

(5th Cir. 1982) (Unit B) (en banc)], and United States v. Cronic, ___U.S.___, 51 U.S.L.W. 3598 (February 22, 1983) (No. 82-6609) [granting certiorari in United States v. Cronic, 675 F.2d 1126 (10th Cir. 1982)]. Because it provides an opportunity to resolve important, recurring, questions concerning state-induced ineffective assistance of counsel which are not presented by Washington and Cronic, Mr. Elledge's ineffective assistance of counsel claim is especially ripe for review by this Court. After showing why his case is a necessary companion to Washington and Cronic, Mr. Elledge will discuss the historical facts underlying his constitutional claim to demonstrate the appropriateness of deciding the issue he presents on the record of his case.

A. Issues Requiring Resolution by this Court

Two aspects of this case merit review by this Court. First, here it was the court's action, the circumstances surrounding its appointment of counsel and then its denial of a continuance needed to develop crucial mitigating evidence, that caused counsel to be ineffective. This case thus presents the question of the proper standard of ineffective assistance and prejudice required when the ineffectiveness resulted from judicial interference with the attorney-client relationship. Secondly, Mr. Elledge's case squarely raises the appropriateness of an "outcome-determinative" test of prejudice in ineffective assistance cases. The Florida courts, in rejecting Mr. Elledge's claim, relied upon the outcome determinative standard for evaluating prejudice that the Florida Supreme Court established in Knight v. State, 394 So.2d 997, 1001 (Fla. 1981). Elledge v. Graham, supra, 432 So.2d at 37. The United States Court of Appeals for the Fifth Circuit in Washington v. Strickland, 693 F. 2d 1243 (5th Cir. 1983) (en banc) rejected the Knight test applied in Florida. There is hence a direct conflict between the standard applied by the federal court, and presently under review by this Court, and the standard followed to affirm Mr. Elledge's death sentence.

Mr. Elledge was denied the effective assistance of counsel at his resentencing due to his counsel's total inability to and failure to investigate Mr. Elledge's one plausible line of

defense. The facts,as developed during the state evidentiary hearing and discussed in more detail below, demonstrate that (1) counsel made no investigation regarding the one plausible defense - Mr. Elledge's mental condition; (2) this lack of investigation was caused by the lack of time allowed to prepare for the resentencing; it did not result from a strategic or tactical decision by counsel; (3) this lack of investigation was extremely prejudicial; had such investigation and preparation been done, significant and compelling evidence could have been presented on Mr. Elledge's behalf.

It is the second element, the reason for the ineffective representation, which raises important sixth amendment issues and which makes this an excellent companion to the two ineffective assistance cases presently pending in this Court.Unlike counsel in Washington and Cronic, counsel in Mr. Elledge's case was prevented by judicial action from effectively representing him. Mr. Elledge's trial counsel was unable to prepare because the court appointed him at the eleventh hour and then denied his motion for a continuance.[1]

Specific cases of ineffective assistance and prejudice fall along a continuum based, in part, upon the degree to which the state is responsible for the resulting deficiencies of defense counsel and calibrated to the degree of prejudice which must be shown before a new sentencing is mandated. On one pole are cases where a state procedure places a disability upon counsel that pervades his entire conduct of the defense. Cases at this extreme of the spectrum include Geders v. United States, 425 U.S. 80 (1976) (defense counsel not permitted to confer with client during overnight mid-trial recess); Herring v. New York, 422 U.S. 853 (1975) (statute barred final summation by defense counsel);

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1 Mr. Elledge readily acknowledges that in general a court's dispositon of a motion for continuance, though it must comport with requirements of due process, Ungar v. Sarafite, 376 U.S. 575, 589 (1964), is a matter within the sound discretion of the trial court. But the question now presented is a violation of the sixth amendment right to counsel, and the standards are significantly stricter: the inquiry now must focus on the quality of represention actually received by Mr. Elledge, and here that inquiry is inseparable from the question of the propriety of the continuance. The issue is the proper inter-relationship between the court's power over continuances and the effect the exercise of such power may have upon a criminal defendant's right to effective representation.

Glasser v. United States , 315 U.S. 60 (1942) (defendants with conflicting interests); Powell v. Alabama, 287 U.S. 45 (1932) (counsel denied adequate opportunity to confer with defendants and to prepare for trial).

In these cases, defense counsel was appointed but prevented by agents of the state from discharging functions vital to effective representation of the clients. The state-created procedures in these cases were what impaired the accused's enjoyment of the sixth amendment guarantee "by disabling his counsel from fully assisting and representing him. Because these impediments constitute direct state interference with the exercise of a fundamental right, and because they are susceptible to easy correction by prophylactic rules, a categorical approach is appropriate." United States v. Decoster, 624 F.2d 196, 201 (D.C. Cir. 1976) (en banc). Reversal in such cases is required, without need of showing prejudice, for the reasons discussed in Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978).

At the opposite pole of the ineffectiveness spectrum are claims that counsel committed certain discrete errors of omission and commission that reasonably effective counsel would not have committed; these errors resulted from counsel's own shortcomings rather than from actions by the State. This type of ineffective representation may just as seriously jeopardize the rights of a criminal defendant as the ineffectiveness discussed above,but they are less offensive to our sense of fairness because here the state is not the cause of the breakdown of the attorney-client relationship. In part for this reason, courts decline to find per se prejudice in this type of case. The Court's recent grants of certiorari in Washington and Cronic have provided an opportunity for the Court to address the critical issue of the degree of prejudice required to be shown in connection with a claim of ineffective assistance when counsel is alleged to have committed discrete errors.

The lower courts have divided into three groups concerning the measure of prejudice in this category of ineffective assistance of counsel claims. The tenth circuit in Cronic held that where the claim involves lack of preparation and experi-

ence, prejudice "cannot be nicely weighed." 675 F.2d at 1128. The fifth circuit, by contrast, held in Washington that a petitioner asserting ineffective assistance must show that that his representation resulted in "actual and substantial disadvantage to the cause of his defense." 693 F.2d at 1128. The most extreme position is that developed by the District of Columbia Circuit in United States v. Decoster, 624 F.2d at 208, 211-12, adopted by the Florida Supreme Court in Knight v. State, 394 So.2d 997, 1001 (Fla 1981) and applied by the Florida Supreme Court in this case: that a defendant suffering inadequate counsel must show, to receive a new trial or sentencing that adequate counsel would change the result on retrial.

Even assuming that the validity of the outcome determinative test is squarely before this Court in Washington, Mr. Elledge's case presents a dimension of the prejudice issue not raised by Washington or Cronic. This case presents the issue of whether the outcome determinative test is too stringent a standard of prejudice for ineffectiveness caused, in part, by governmental interference with the right to counsel. Thus, this case falls somewhere between the two polar extremes discussed above. The governmental interference arguably was not so severe that a new trial should be granted automatically. Yet it was sufficiently severe to preclude a conclusion that defense counsel was unhampered in his conduct of Mr. Elledge's case. The requisite showing of prejudice should be less where the denial of effective assistance of counsel results from interference by the state with that right. Regardless of the level of state involvement, however, Florida appears determined to apply its outcome determinative test of prejudice. This is an issue requiring resolution by this Court.

B. Petitioner's Claim of Ineffective Assistance of Counsel

Mr. Elledge's trial attorney testified below that he had only a few days (3 or 4) in which to prepare for the resentencing trial and that this was wholly insufficient for proper preparation, consultation and investigation. This lack of time arose from the lawyer not knowing that the scheduled trial date of August 2, 1977 was firm, not knowing that the Florida Supreme

Court had denied rehearing or issued a mandate, and not being informed or otherwise aware that Mr. Elledge had been returned to Broward County and thus was available for consultation.[2]

Counsel did not learn that Mr. Elledge was in the county jail until July 28, 1977 when he received a call from Mr. Elledge who wanted to know why counsel had not come to see him. In their first meeting counsel and Mr. Elledge discussed the case briefly and counsel then prepared a motion for continuance which he filed on July 29, 1977. Defense counsel thought the motion would be granted because he could not see any reason it should not be --there was no speedy trial problem, there was no question of bail, there were no other pending charges, and most importantly because he was telling the court that he needed more time to prepare and that he needed to investigate and call witnesses. The continuance was not granted and the trial proceeded over counsel's protestations that he was not prepared. Consequently, he was forced to proceed to trial without any substantive witnesses, with only Mr. Elledge's uncorroborated testimony, and with pretrial preparation limited to going over Mr. Elledge's testimony in the prior trial.

The facts showing prejudice under these circumstances are compelling. Counsel did have specific, concrete information bearing upon sentencing that he was unable to present to the fact-finders. And, had counsel been able to investigate this information, it is now known that dramatic evidence would have been found in mitigation of punishment. None of this evidence, however, was able to be presented on Mr. Elledge's behalf The

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[2] Counsel's involvement with the case had ended more than two years previously (he did not represent Mr. Elledge on appeal). Sometime near the middle of July, 1977, the trial judge asked counsel to represent Mr. Elledge at the resentencing trial and indicated that August 2nd was the scheduled date. Counsel agreed to do so.

Upon agreeing to represent Mr. Elledge at the new sentencing trial, counsel assumed that the August 2nd trial date was only tentative and that he could move for additional time if needed. Counsel's view of the tentativeness of the date was also reinforced by the fact that he knew that a rehearing had been filed in the Florida Supreme Court and was under the erroneous impression that the Florida Supreme Court had not issued its mandate. Counsel also was unaware that Mr. Elledge had been returned to Broward County and was available for conferences and consultation.

capital sentencing of Mr. Elledge is thus neither individualized nor reliable, as it omitted the major aspects of Mr. Elledge's character and the circumstances of the offense.

Counsel emphatically reiterated at the hearing below what he told the judge during the hearing held on his motion to continue: that he was not ready to proceed on August 2, 1977. There were a number of important facts that counsel needed to investigate and confirm. When he met with Mr. Elledge in those few short days before trial, Mr. Elledge had informed counsel that while in prison the doctors had prescribed and placed Mr. Elledge on "mind drugs" such as "Mellaril and another drug used for epilepsy [dilantin]." Counsel testified that this was critically important because for the first time there might be concrete evidence to support his belief (and his only line of defense) that Mr. Elledge was "crazy." Counsel did not mention this evidence in his motion for continuance because he needed more time to investigate it (and because he thought the continuance would be granted). See Hintz v. Beto, 379 F.2d 937, 942 (5th Cir. 1967) Counsel also wanted to find and present witnesses concerning Mr. Elledge's "early upbringing". Counsel believed that if he would have had time to prepare, the "psychiatric evidence would bear fruit." Counsel testified emphatically that he was "not prepared" in his representation of Mr. Elledge at the penalty trial. Thus, there were specific areas that required investigation. These areas related directly to the only plausible line of defense. Counsel however could not investigate these matters sufficiently to present these matters at trial.

The hearing below established the dramatic and compelling evidence that could have been discovered and presented had counsel been able to conduct the investigation he believed essential. This evidence is of such a quality as to provide a powerful defense to the imposition of the death penalty.[3]

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[3] The evidence that could have been discovered with adequate investigation was proffered below. [The witnesses could not be present to testify because the trial judge denied the motion by Mr. Elledge to provide the funds necessary to secure their attendance at the proceedings below.]

First, Dr. Dorothy Lewis conducted a complete psychiatric evaluation of Mr. Elledge and concluded, as suspected by Mr. Elledge's trial counsel, that at the time of the offense Mr. Elledge was suffering from a severe mental disorder that caused him to act the way he did and precluded him from controlling his actions. Dr. Lewis found that for a long time before the offense, as well as at the time of the offense, Mr. Elledge was severely mentally ill as a result of central nervous system disorders as pervasive and potentially as documentable as a brain tumor. She described his illness as consisting of three severe, interactionally related disorders: an organic impairment of his brain, which was most akin to (and which may have been) psychomotor epilepsy; episodic dyscontrol, a severe dysfunction of the electrical system of the brain precipitated by the ingestion of drugs and alcohol; and psychotic paranoia. In Dr. Lewis' opinion, all three of these disorders combined to produce uncontrollable violent outbursts resulting in the sexual assault upon and homicide of Margaret Strack. [A copy of Dr. Lewis' report is set out in Appendix D]

Second, these findings of Dr. Lewis were firmly supported by Mr. Elledge's documented biological vulnerabilities, his family history and background and his environment. The testimony of members of Mr. Elledge's family that would document the specifics of the family life and environment was proffered below in detail, more completely than ever before. [4]

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[4] Although Mr. Elledge was evaluated prior to his original trial by two psychiatrists, these evaluations focused only on the narrow issues of competency and sanity (as a guilt-innocence defense). Moreover, the evaluations were quite perfunctory and were not based on the extensive information which could have been developed --had counsel been provided adequate time -- and which was available to Dr. Lewis. With the information available to Dr. Lewis, and with Dr. Lewis' evaluation of Mr. Elledge in light of that information, counsel testified at the post-conviction hearing that he could have effectiely countered any effort by the state to use the earlier psychiatric evaluations to defeat his claim that Mr. Elledge was severely impaired at the time of the homicide.

Third, confirming trial counsel's firm belief that adequate investigation of Mr. Elledge's mental state would "bear fruit," this evidence explained -- in a mitigating way -- why Mr. Elledge committed the homicide. Mr. Elledge assaulted and killed Margaret Strack because her perceived sexual teasing --in his life long context of sexual abuse and brutalization -- triggered his latent psychotic paronia. While the psychosis caused him to attack Ms. Strack, his ingestion of drugs and alcohol, along with the stress of Ms. Strack's perceived rejection, also triggered the abnormal electrical activity in his brain which produced an outpouring of rage which he had absolutely no means of controlling. His loss of memory for the several hour period following the rage attack of Ms. Strack further confirmed the brain dysfunction underlying the homicide. Accordingly, at the time of the homicide Mr. Elledge was severally mentally ill, and his illness absolutely foreclosed any possibility of his conforming his behavior to the requirements of law.[5]

Thus, the investigation which Mr. Elledge's counsel did not undertake had extraordinarily serious consequences for Mr. Elledge. His counsel did not -- and could not -- present on his behalf evidence which thoroughly explained -- and mitigated -- a crime which appeared to be the kind of crime that ought to be punished by death. What were in truth the acts of a terribly impaired, ill man were thus seen by the jury and the judge as the acts of a terribly evil man, because defense counsel was not given the opportunity to investigate and develop facts which came to his attention on the eve of trial.

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[5] Briefly, it should be mentioned that Dr. Lewis' credentials are unassailable. Her curriculum vitae was proffered below and is available for this Court's review. In addition, as also proffered, Dr. Lewis has been selected to author the chapter concerned with delinquency, violence, and central nervous system disorders in the leading textbook of psychiatry, The Comprehensive Textbook of Psychiatry. She is undoubtedly among the current leaders, if not the leader, in the nation in this field which seeks to understand the causes of delinquent and violent behavior. She has authored two books, more than forty-eight articles and book chapters in her field, and has presented more than sixty papers at conferences and symposia all over the country.

Surely Mr. Elledge was prejudiced by this. Yet no one can say that the outcome of his sentencing trial would have been altered if counsel had been able to investigate these facts and present the kind of evidence described in the preceding paragraphs. What can be said, with certainty, is that Mr. Elledge's character and the circumstances of the offense would have been much more thoroughly considered had these facts been investigated and presented. What can also be said, with certainty, is that a capital sentencing proceeding which omits from the sentencer's consideration the kind of evidence discussed herein cannot "ensure the reliability, under the Eighth Amendment standards, of the determination that 'death is the appropriate punishment in a specific case.'" Lockett v. Ohio, 438 U.S.586, 601 (1978), quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

Accordingly, the Court should grant certiorari to determine the constitutionally proper measure of prejudice in the analysis of a claim that counsel provided ineffective assistance in a capital sentencing trial because, in part, the state prevented counsel from conducting the investigation which would have produced relevant, compelling evidence in mitigation.

CONCLUSION

For the reasons expressed herein, the petitioner, WILLIAM DUANE ELLEDGE, respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully Submitted,

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APPENDIX

William Duane ELLEDGE, Petitioner/Relator,

v.

Robert GRAHAM, Governor, State of Florida; Louie L. Wainwright, Secretary, Florida Department of Corrections, Respondents.

William Duane ELLEDGE, Petitioner,

v.

Louie L. WAINWRIGHT, Secretary, Florida Department of Corrections, Respondent.

William Duane ELLEDGE, Petitioner,

v.

STATE of Florida, Respondent.

William Duane ELLEDGE, Appellant,

v.

STATE of Florida, Appellee.

Nos. 63344, 63345, 63387, 63388.

Supreme Court of Florida.

April 14, 1983.

Rehearing Denied June 22, 1983.

Petitioner convicted of first-degree murder urged Supreme Court to issue its writ of habeas corpus to permit appellate review of denial by the Circuit Court, Broward County, M. Daniel Futch, Jr., J., of his motion to suppress custodial statements and, in addition, to issue writs of quo warranto and/or habeas corpus to prevent execution of death warrant. Petitioner also appealed denial of his motion to vacate judgment and sentence and, further, petitioned for leave to file late petition for writ of error coram nobis and/or for extraordinary relief with regard to capital penalty trial. The Supreme Court held that: (1) petitioner was not entitled to appellate review of trial court's denial of his motion to suppress his confessions, and (2) petitioner was not entitled to vacation of judgment and sentence.

Order accordingly.

1. Criminal Law ⇐1219

When death sentence was superimposed upon existing life sentence, petitioner had no legal right to serve life sentence before death sentence could be carried out.

2. Criminal Law ⇐1026, 1180

Petitioner was not entitled to appellate review of trial court's denial of his motion to suppress confessions, where he pleaded guilty and did not raise this issue on his previous appeals.

3. Criminal Law ⇐1026

A guilty plea cuts off any right to an appeal from court rulings that preceded the plea with the exception of a limited class of issues which occur contemporaneously with the entry of the plea, namely, the subject-matter jurisdiction, the illegality of the sentence, the failure of the government to abide by the plea agreement, and the voluntary and intelligent character of the plea.

4. Criminal Law ⇐997.8

Petitioner was not entitled to writ of error coram nobis on ground of newly discovered evidence, in that facts were either available or could have been obtained at time of sentencing.

5. Criminal Law ⇐998(7, 8)

Petitioner was not entitled to vacation of judgment and sentence, in that his confessions and guilty plea were properly admitted and allegation of ineffective assistance of counsel had not been shown. West's F.S.A. RCrP Rule 3.850.

Richard L. Jorandby, Public Defender; Craig S. Barnard, Chief Asst. Public Defender, and Richard H. Burr, III, Asst. Public Defender, Fifteenth Judicial Circuit, West Palm Beach, for petitioner/relator, in No. 63344, petitioner in No. 63345 and 63387 and appellee in No. 63388.

Jim Smith, Atty. Gen. and Joy B. Shearer, Asst. Atty. Gen., West Palm Beach, for respondents in No. 63344 and 63345 and appellee in No. 63388.

PER CURIAM.

Petitioner urges this Court to issue its writ of habeas corpus to permit appellate review of the lower court's denial of his motion to suppress custodial statements and, in addition, to issue writs of quo warranto and/or habeas corpus to prevent the execution of the death warrant. Petitioner also appeals the denial of his rule 3.850 motion to vacate judgment and sentence and, further, petitions for leave to file a petition for writ of error coram nobis and/or for extraordinary relief with regard to the capital penalty trial. We have jurisdiction. Art. V, § 3(b)(7) & (9), Fla.Const. We find no merit in petitioner's arguments, deny all petitions and affirm the denial of his motion to vacate judgment and sentence.

On March 17, 1975, in the Seventeenth Judicial Circuit in and for Broward County, petitioner William Duane Elledge moved to suppress certain custodial statements. Upon the denial of his motion, he entered pleas of guilty to first-degree murder and rape, and on March 27, 1975, was sentenced to death. On direct appeal, this Court affirmed petitioner's conviction but vacated the death sentence, ordering the trial court to conduct a new sentencing trial. *Elledge v. State*, 346 So.2d 998 (Fla.1977). Following that trial, petitioner was resentenced to death on August 3, 1977. On appeal this Court affirmed the death sentence. *Elledge v. State*, 408 So.2d 1021 (Fla.1981), *cert. denied*, — U.S. —, 103 S.Ct. 316, 74 L.Ed.2d 293 (1982). On February 15, 1983, the Governor of Florida signed a death warrant ordering petitioner's execution.

QUO WARRANTO AND/OR HABEAS CORPUS

[1] Petitioner contends that since his 1977 death sentence contained a provision that the sentence run consecutive to a sentence of life imprisonment imposed in Case No. 74-3811, in which petitioner also pleaded guilty to first-degree murder, the death sentence cannot be carried out until after the expiration of the life sentence, which carries a mandatory minimum of twenty-five calendar years. We find this position wholly without merit. When a death sentence is superimposed upon an existing life sentence, the defendant has no legal right to serve the life sentence. *Blitch v. Buchanan*, 100 Fla. 1242, 132 So. 474 (1931) and *Whitney v. State*, 132 So.2d 599 (Fla. 1961).

HABEAS CORPUS

[2, 3] Relying on *Anderson v. State*, 420 So.2d 574 (Fla.1982), petitioner also urges that he now is entitled to appellate review of the trial court's denial of his motion to suppress his confessions, even though he pleaded guilty and did not raise this issue on his previous appeals. We disagree. A guilty plea cuts off any right to an appeal from court rulings that preceded the plea with the exception of a limited class of issues which occur contemporaneously with the entry of the plea: (1) the subject matter jurisdiction, (2) the illegality of the sentence, (3) the failure of the government to abide by the plea agreement, and (4) the voluntary and intelligent character of the plea. *Robinson v. State*, 373 So.2d 898 (Fla. 1979). The petitioner's challenge falls in this latter category because it is based on the assertion that he would not have pleaded guilty had the confessions been suppressed. A proper challenge to the voluntary and intelligent character of a guilty plea is presented to the trial court by a motion to withdraw the plea. A denial of such motion would be subject to review on direct appeal. *Robinson*. So far as we are aware, the petitioner has not previously sought to withdraw his guilty plea nor did he raise the issue on the direct appeal of his death sentence. We accorded the petitioner automatic review as we do in all death cases, and affirmed his conviction and sentence of death. *Elledge II*. § 921.141(4), Fla.Stat. (1975). Petitioner since has raised the issue of the voluntariness of his guilty plea before the trial court by means of a rule 3.850 motion, which we address below. We know of no other right of review to which the petitioner is entitled.

ERROR CORAM NOBIS

Elledge's petition presents what is purported to be newly-available evidence:

1. An undated psychiatric report by Dr. Lewis, apparently prepared in late 1982 or early 1983, based on her interviews with Elledge, a telephone interview with Elledge's mother, a review of neuropsychological testing, and a review of various institutional records through the present. Dr. Lewis concludes that "Elledge's ability to control his behavior at the time of the murder was seriously impaired."
2. A series of conclusions by petitioner's counsel based on personal and telephonic interviews with various members of Elledge's family. Counsel concludes that there is "some organic vulnerability to violent behavior in petitioner's family; and ... petitioner's thinking may also stem from an inherited tendency toward disorganized thought processes."

[4] The "facts" on which Dr. Lewis and counsel rely are not new: they were either available or could have been obtained at the time of sentencing. We note that Elledge was examined by two psychiatrists prior to trial and both stated that at the time of the rape/murder he understood and could appreciate the nature and consequences of his acts. Petitioner has presented no new information—merely a psychiatrist who draws different conclusions. *Booker v. State*, 413 So.2d 756 (Fla.1982); *Hallman v. State*, 371 So.2d 482 (Fla.1979).

RULE 3.850

Elledge appeals the denial of his rule 3.850 motion. He presents five issues for our consideration:

1. Ineffective assistance of counsel.
2. The voluntariness of his guilty plea.
3. Alleged error by the trial court in striking grounds for relief.
4. Denial of equal protection and a fair hearing by denial of funds for expert and lay witnesses.
5. The unconstitutionality of Florida's death penalty as applied.

[5] Our review of the record convinces us that the appellant's confessions and guilty plea were properly admitted and that the allegation of ineffective assistance of counsel has not been shown. *Knight v. State*, 394 So.2d 997 (Fla.1981); *Williams v. State*, 316 So.2d 267 (Fla.1975). We have fully reviewed the remaining issues raised by the appellant and find them to be without merit.

The petitions for quo warranto, habeas corpus, and leave to file a writ of error coram nobis are denied. The denial of the appellant's 3.850 motion is affirmed.

It is so ordered.

ALDERMAN, C.J. and ADKINS, BOYD, OVERTON, McDONALD, EHRLICH and SHAW, JJ., concur.

Supreme Court of Florida

WEDNESDAY, JUNE 22, 1983

WILLIAM DUANE ELLEDGE, Petitioner/Relator, v. ROBERT GRAHAM, Governor, State of Florida; LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections, Respondents.	*	CASE NO. 63,344
WILLIAM DUANE ELLEDGE, Petitioner, v. LOUIE L. WAINWRIGHT, Secretary Florida Department of Corrections, Respondent.	*	CASE NO. 63,345
WILLIAM DUANE ELLEDGE, Petitioner, v. STATE OF FLORIDA, Respondent.	*	CASE NO. 63,387
WILLIAM DUANE ELLEDGE, Appellant, v. STATE OF FLORIDA, Appellee.	*	CASE NO. 63,388 Circuit Court No. 75-0087CF (Broward)

Upon consideration of the Motion for Rehearing filed in the above causes by attorney for Petitioner/Appellant, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Sonya Carnell
Deputy Clerk

TC
cc: Hon. Robert E. Lockwood, Clerk
Hon. M. Daniel Futch, Jr., Judge

Craig S. Barnard, Esquire
Richard H. Burr, III, Esquire
Robert L. Bogen, Esquire
Joy B. Shearer, Esquire
Sharon Lee Stedman, Esquire

CHAPTER 921

SENTENCE

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose

sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 527, ch. 19634, 1939 CGL 1940 Supp. 6463.246; s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 74-328; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174.

Note.—Former s. 919.23.

Psychiatric Report on William Elledge

The following psychiatric report is based on three psychiatric interviews with Mr. Elledge lasting approximately 2 -3 hours each, a telephone interview, with his mother, a review of neuropsychological testing performed by Elizabeth McMahon, Ph.D., and a review of the following materials:

1. Transcript of Mr. Elledge's statement before the Florida Parole and Probation Commission, 9/10/82.
2. California Department of Youth Authority Records (3/20/67 - 6/11/70)
3. Colorado State Hospital records (30 day criminal observation commitment) (1-11-73)
4. Medical record, Florida State Prison (4-16-75 to present)
5. Prisoner's file (excerpts), Florida State Prison (4-16-75 to present)

William Elledge is a 32 year old white man who has been awaiting execution at the Florida State Prison for the past eight years for the murder of a woman in 1974. The following evaluation and report were prepared at the request of Mr. Elledge's legal defense attorney because of the episodic nature of Mr. Elledge's violent acts and his altered states of consciousness subsequent to these acts.

Medical History

Mr. Elledge's behavior throughout childhood, adolescence, and young adulthood cannot be understood without an appreciation of his extraordinarily adverse medical and sexual histories.

Mr. Elledge was the product of a pregnancy complicated by uterine bleeding, a condition frequently associated with central nervous system damage to the infant. At birth he was a sickly fussy infant who was difficult to soothe.

Apparently, on one occasion, his mother was so drained and angered by the infant, that she attempted to throw him out a car window, but was stopped by her husband. This episode was but the earliest instance recorded in a long series of batterings experienced at the hands of his mother. Mrs. Elledge herself, an extremely guarded woman, admitted that at times she knew she had "gone too far" in her physical chastisement of William. Mr. Elledge recalls episodes when his mother pushed him to the floor, sat on top of him, and banged his head on the floor. On one occasion, she also threatened him with a rifle and was restrained by Mr. Elledge's father. Given the history of severe battering by his mother from infancy onward, it would be impossible to determine whether the organically influenced aspects of William's symptoms and behaviors evident throughout his lifetime were primarily the result of inutero central nervous system damage or of the numerous head injuries inflicted by his mother.

In addition to perinatal complications and batterings, Mr. Elledge experienced numerous head injuries throughout childhood and young adulthood. His mother reports an episode in which he "bashed his head against a concrete wall in the cellar" at age 5 years. Mr. Elledge still has a swelling on his forehead, attesting to the severity of the blow. In addition to the accident at age 5, he sustained a blow to his head at about age 9 when he was hit over the head with a croquet mallet by his brother. At around this time, his nose was first broken in an accident, the nature of which is unclear. His nose was subsequently broken in his early teens when he was hit in the face with a 2 x 4 board. The severe injuries to his nose (attested to by its present deformity) are important because severe injury to the nose is often transmitted to the temporal lobes of the brain, which are situated behind the nasal cavity. Damage to this area of the brain is often associated with episodic

rage. During young adulthood, Mr. Elledge also sustained two severe head injuries prior to the murder in question, one when he was hit in the right frontal area with a rifle butt, the other when his motorcycle hit a car and he slammed into the side of the car. In short, Mr. Elledge sustained numerous traumata to his head, any one of which could have contributed to his episodic rage reactions.

Sexual History

The sexual nature of Mr. Elledge's aggressive act can only be understood in the context of his having been sexually as well as physically abused. At an early age (approximately 9 years), two episodes of sexual abuse occurred. Mr. Elledge was accosted by a man in a truck from whom he hitched a ride. Instead of taking him to his destination, the man drove him to a wooded area, then attacked him, choking him, throwing him to the ground, and forcing anal intercourse. According to Mr. Elledge, he lost consciousness and later awakened in the woods, injured and frightened. He was afraid to tell his parents of the event because they had forbidden him to hitchhike and they would beat him, while he was naked, for infractions of their rules.

At about that time, Mr. Elledge's older sister forced him to stimulate her sexually, threatening to get him in trouble with his mother if he refused. This sexual relationship with his sister continued throughout childhood and his first experience of intercourse was with his sister.

At about age 13 or 14, Mr. Elledge and his sister were discovered having sexual relations by a female neighbor, a woman in her 30's. This woman then brought Mr. Elledge to her apartment and, under threat of revealing to his parents his sexual relationship with his sister, she forced him to perform oral sexual acts on her. Her demands on him continued over the subsequent year or two and, with the promise of teaching him how to please any woman, she encouraged him to have intercourse with her.

Of special note, the only violent juvenile act of which Mr. Elledge was accused, the battery of a 9 year old girl, occurred when he left this woman's house after having been given liquor and sexually stimulated by her. Thus, there would seem to be a fairly clear etiological relationship, at least in this instance, between sexual abuse and aggression.

During childhood Mr. Elledge was also sexually abused by a 20 year old male cousin. He was frequently beaten while naked by his mother and father and he also witnessed his father beat his sister on her bare buttocks.

Family History

Little is known about Mr. Elledge's family because of their reluctance to become involved in his case. They have never visited him since his incarceration in 1974. According to records and to Mr. Elledge's report, both of his parents were alcoholic and violent. He witnessed numerous physical fights between them and saw his mother smashed to the floor by his father. Although Mr. Elledge idealizes his father, calling him a very gentle, kind man, he recalls an instance when his father assaulted a neighbor, many episodes when he and his sister were beaten by his father, and verbal battles between his parents when his mother accused his father of "screwing with your daughter." The likelihood that this act did indeed occur is supported by the fact that Mr. Elledge's sister initiated him into sexual activity and attempted to have intercourse with him when he was only 9 or 10 years old.

The exact nature of Mrs. Elledge's psychopathology could not be determined because of her reluctance to meet with me. Her periodic fierce

rages in which on occasion she had to be restrained from killing her son, coupled with times of great lethargy, withdrawal, alcoholism, and inability to function as a mother suggest that she probably suffered from a serious mood disorder. At times her behaviors were so inappropriate (as when she played half-nude on the bed with her children and teased them by placing a hot dog in her panties) cause one to wonder whether she was indeed psychotic at times and also whether she was of normal intelligence. Another indication of possible maternal psychosis was her reaction when she received letters from Mr. Elledge's attorney's office, requesting a meeting with her. When I spoke to her on the phone, she told me that she thought she was being tricked by an escaped convict from Florida and she called the F.B.I. to check out the validity of the letters she had received from the Legal Defense Offices. On the phone with me she was so guarded that she would supply little information about the family. She did report her bleeding during the pregnancy with William and admitted that sometimes she "went too far" when she beat her son.

Psychiatric History

Mr. Elledge's severe psychiatric problems date from early childhood. As early as age 5 or 6 years, he was unable to function appropriately in the classroom, got into frequent fights with schoolmates, and felt suspicious of teachers. These kinds of behaviors are often characteristic of children with brain dysfunction and of prepsychotic children. Because of his extreme difficulty functioning in a classroom, Mr. Elledge was often seated in the front of the classroom near the teacher. This increased his discomfort because he was constantly convinced that other children were snickering at him behind his back and he would frequently reel around and retaliate

for imagined insults.

As he became older, this paranoid attitude, accompanied by frequent misperceptions and misinterpretations of the words and actions of others, caused him to stike out defensively even when not under attack.

Mr. Elledge's extraordinarily bizarre work history (he made over 45 moves in a period of about 7 years) is a reflection of his paranoid discomfort at each job he took, from dishwasher to manager of a diner. At each job he felt persecuted and misunderstood by his bosses and sometimes left after a short time without even being paid. (See xerox of his travels). As early as age 14, Mr. Elledge felt the need always to be armed to defend himself.

Some of Mr. Elledge's moves were precipiated by even more bizarre motives than paranoia. For example, when Mr. Elledge was in Canada he read a newspaper story about a woman who had been doused with gasoline and set on fire by a gang in Boston. He was enraged because the story said that none of the people who heard the woman's screams had helped her. In response to this story, Mr. Elledge conceived of a plan to obtain a gun in New York, go to Boston, and walk around the neighborhood where the murder took place. He believed that he would then be attacked by the same gang and would shoot them. This idea became so forceful that Mr. Elledge went as far as to obtain a sawed off shotgun in New York City, then travel to Boston with the intention of finding the aforementioned neighborhood. Once he got to Boston, however, Mr. Elledge realized that he was possibly psychiatrically ill and, instead of going through with his plan, sought psychiatric treatment at a Boston hospital. He said he felt he needed hospitalization, but it was refused and he was put on a waiting list for outpatient treatment.

Another psychotic episode occurred shortly prior to the murder in question. After having been insulted (?beaten up) by some men in Oklahoma, Mr. Elledge obtained 4 or 5 guns, secreted them around his house, and believed that he would be able to lure the men to this house and ambush them. At this time, Mr. Elledge's wife, Diane, told him that he was sick and pleaded with him to get help. When he persisted in his bizarre plot, she left him.

Prior to the murder and subsequent incarceration, Mr. Elledge also suffered from periods of extreme depression. In fact, as early as age 17, Mr. Elledge made a serious suicide attempt, taking a lethal dose of barbiturates. He was hospitalized and unconscious for from 1-2 weeks. At a later date he attempted to kill himself by turning on the gas in his stove and breathing it in, but then changed his mind and turned it off. It is likely that Mr. Elledge's extensive and extended alcohol and drug history developed as an unsuccessful attempt to treat his own depression. In Mr. Elledge's case, alcohol and drugs increase his paranoia and also seem to trigger violent episodes over which his control is severely impaired. Unfortunately, his apparent lucidity between episodes has caused him to be dismissed by psychiatrists and psychologists as psychiatrically well and to be denied proper diagnostic and therapeutic intervention.

Over the years, Mr. Elledge has experienced episodes, violent and nonviolent, for which his memory is clouded or totally absent. A most dramatic example of this phenomenon occurred in the early 1970's when Mr. Elledge found himself in Seattle. When he came to his senses, he was totally unaware of how he got to Seattle, although a reconstruction of events during the prior two weeks determined that he had driven there himself. On another occasion, he found himself all the way across town in a particular city with no idea how he got there. At another time, he found himself hitchhiking on

a highway and did not know how he got there. The earliest episode of this kind that he recalls happened when, as a teenager, he was told by his mother that he had siphoned gas from one car to another, an act of which he still has no memory.

The Murder

The question arises in what ways the psychopathology documented above is relevant to the murder for which Mr. Elledge is sentenced to death. The event, as far as it can be reconstructed, would seem to be influenced in great measure by Mr. Elledge's longstanding paranoia (exacerbated by alcohol) as well as his episodic uncontrollable rages (also precipiated by alcohol). According to Mr. Elledge, the victim herself was sexually inviting. In fact, he says that she initiated intercouse by coming out of the bathroom with her panties at her knees and coming over to him. It would seem, however, that when he responded eagerly, she in some way held him off. It is not at all clear that she did more than gently push him back or attempt to slow him down. Clearly she was interested in having sexual relations. However, her reluctance to proceed quickly triggered in Mr. Elledge a feeling of being totally rejected and tricked. His report of feeling teased and angered is very similar to his report of feelings engendered when his mother, sister, and neighbor sexually manipulated him. Similarly, after the sexual act, when the victim threatened to report him to the police, her words were as threatening and frustrating as when his sister and his neighbor threatened to tell his parents about his behavior if he failed to comply with their wishes.

The violence with which Mr. Elledge responded to this threat would

seem to be a consequence of his repeated central nervous system injury coupled with his peculiar vulnerability to the effects of alcohol. Once started, Mr. Elledge was in an altered state in which it is doubtful he could have stopped choking the victim even were a gun at his head. His subsequent dazed state, lasting several hours, for which memory was impaired, suggests the possibility of his having experienced a seizure at some time during the choking episode. His impaired memory for the hours following the act must be believed because he reports whatever he recalls of the murder itself and thus would have no conscious or unconscious motive for concealing its aftermath. This memory lapse is not hysterical since it is for a period following the murder, whereas an hysterical amnesia would almost certainly involve the murder itself and an unconscious wish to forget it.

Diagnostic Impression

Mr. Elledge's pathology does not fall into a neat categorization but is, rather, the reflection of several serious disorders. First, Mr. Elledge is periodically psychotically paranoid, at which times he misperceives his environment and lashes out. Second, the extraordinary intensity of his periodic rages and his episodic lapses of memory for behaviors (not necessarily violent), coupled with his history of severe central nervous system trauma, suggest an organic impairment underlying his behaviors.

Furthermore, the fact that many of his violent episodes are triggered by alcohol suggests a pathological reaction to that substance, in which Mr. Elledge's paranoia is exacerbated and his rage reactions cannot be controlled. This phenomenon, called "episodic dyscontrol," has been well documented to exist, and is often associated with abnormal electrical activity in the

limbic system of the brain.

Given this combination of disorders there is no doubt in my mind that Mr. Elledge's ability to control his behavior at the time of the murder was seriously impaired.

Recommendation

I would suggest that an alcohol stimulated electroencephalogram be conducted to attempt to document this person's abnormal response to alcohol. It should be stressed, however, that the kind of abnormal brain activity described occurs deep in the brain and may not always be reflected in a surface E.E.G. You might also consider a sleep E.E.G. with nasopharyngeal leads which is more likely than an ordinary E.E.G. to document abnormal limbic system activity. His positive response to treatment with Dilantin while in prison suggests its future usefulness.

Dorothy Otnow Lewis

Dorothy Otnow Lewis, M.D.
Professor of Psychiatry

Roughly The cities I've Spent More Than A week in

1. Born June 27, 1950 Witchita Kansas
2. Joplin Missouri
3. Greenwood Missouri
4. Parsons Kansas
5. Witchita Kansas Where Bro. Danny was born...
6. Joplin Missouri
7. Langley Oklahoma
8. Denver Colorado
9. San Joaquin Valley Cailf
10. Los Angeles Calif
11. Torrance Calif
12. Wilmington Calif
13. Long Beach Calif
14. Denver Colorado
15. Boulder Colorado
16. Los Angeles Calif
17. Hollywood Calif
18. San Francisco Calif
19. Seattle Washington
20. Jacksonville Fla.
21. Chicago Ill.
22. Montreal Canada
23. Grossinger New York
24. Brooklyn New York
25. Boston Mass
26. Trinidad Colorado
27. Denver Colorado
28. Trinidad Colorado
29. St. Louis Missouri
30. Venna Missouri
31. San Diego Calif.
32. Turlock Calif
33. Tulsa & Langley Oklahoma
34. Walsenburg Colorado
35. Pueblo Colorado
36. Denver. Colo.
37. Gardner Colo
38. St. Louis Missouri
39. Port Heuron Mich
40. Lansing Mich
41 Lambeauville Mich
42 Toledo Ohio
43 Bowling Green Ohio
44 Toledo Ohio
45 Hollywood Fla
46 Jacksoville Beach Fla

Roughly Youth and Early to Mid Teens

Late Teens and Early 20's

Met Darice

'74

Got Married Still Split up

From 74 Married Till I was Busted

That's When I got Busted

I've been through every state ex-
cept Alaska & Hawaii...

Plus Short trips to Mexico often.....

No. 83-5463

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

==========

WILLIAM DUANE ELLEDGE,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

==========

AFFIDAVIT

I, WILLIAM DUANE ELLEDGE, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees;

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I was convicted and sentenced to death by the Circuit Court of Broward County, Florida. I filed a motion for post-conviction relief in the trial court and that motion was denied. The Supreme Court of Florida upheld the trial court's ruling. I am now petitioning for a writ of certiorari to the Supreme Court of the United States.

William D. Elledge

WILLIAM DUANE ELLEDGE

Duly witnessed and sworn to before me
this 22 day of September, 1983.

Ricky K Mayo

NOTARY PUBLIC

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES SEPTEMBER 15, 1984

CASE NO. 83-5463

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIAM DUANE ELLEDGE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Counsel for Respondent

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TABLE OF CITATIONS

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THERE WAS SUBSTANTIAL DEFICIENCY IN PETITIONER'S REPRESENTATION?

II. WHETHER THE STATE COURTS APPLIED THE CORRECT STANDARD OF REVIEW FOR A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL?

INTRODUCTORY STATEMENT

"R" followed by a Roman numeral and then an arabic number, indicates the page and volume of the record on appeal.

"S.R.I." followed by a arabic number refers to the supplemental record and page number.

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1983

WILLIAM DUANE ELLEDGE,	)	
	)	
Petitioner,	)	CASE NO. 83-5463
	)	
v.	)	
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	
	)	

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT, the State of Florida, through undersigned counsel files this Response to the instant Petition for Writ of Certiorari to the Supreme Court of Florida as follows:

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts subject to the following additions and/or clarifications:

On July 11, or 12, 1977, after the remand of Petitioner's case for a new sentencing proceeding Mr. McCain (original trial counsel) was appointed to represent Petitioner on re-sentencing, which was scheduled for August 2, 1977 (R. IV. 9). On July 29, 1977 a motion for continuance was filed (S.R.I. 2) asserting that several defense witnesses were not available to testify the first week of August, 1977. The prosecution objected to the continuance on the basis that the testimony of

of the prospective defense witnesses regarding the effectiveness of capital punishment as a deterrent was not directly relevant to Petitioner's sentencing proceeding. Defense counsel proffered that:

> Basically, what the witnesses will testify to are the advantages or disadvantages of capital punishment; and would go into different aspects on the basis of statistics. (R. IV, 5-6).

Defense counsel made no mention of further psychological examinations and the motion for continuance was denied (R. IV, 10).

REASONS FOR DENYING THE WRIT

I. THERE WAS NO SUBSTANTIAL DEFICIENCY IN PETITIONER'S REPRESENTATION.

Petitioner pyramids one faulty premise upon another to arrive at the question posed in Petitioner's argument; that is, whether the "outcome determinative standard is proper for analyzing prejudice resulting from the denial of effective assistance of counsel." Before even addressing the stated issue, Respondent would like to review the historical chronology of the matter to demonstrate why the instant case is not even an appropriate vehicle for addressing the stated issue.

Aside from being Petitioner's original trial counsel, Mr. McCain was appointed to represent Petitioner for re-sentencing on July 11 or 12, 1977. At that time counsel was apprised that the re-sentencing was scheduled for August 2, 1977. The stated reason for the requested continuance was to gather sociological evidence as to the effect of the death penalty. Such evidence

is inadmissible. Shriner v. State, 386 So. 2d 525 (Fla. 1980); Scott v. State, 411 So. 2d 866 (Fla. 1982). It is evidence that does not relate to the character or record of the defendant, or the circumstances of the crime for which he was being sentenced. Lockett v. Ohio, 438 U.S. 586 (1978). Therefore, the denial of the continuance was proper.

The fact is, Petitioner was precluded from presenting nothing to the sentencing jury and the sentencing judge at his sentence hearing. Nonetheless, Petitioner argues as if, as long as he comes up with something "new," no matter how far down the road, he is entitled to a new sentencing hearing. Respondent is confident that death penalty law does not abrogate the doctrine of "finality," as Petitioner would desire. Were this the case, there would be no end whatsoever to a sentencing hearing, because defendants would always, in the future, come up with some new matter of mitigation. It is to be noted that Petitioner cites no law whatsoever that would indicate that the doctrine of "finality" is abrogated in death penalty cases.

The United States Supreme Court has recognized the doctrine of finality, in Wainwright v. Sykes, 433 U.S. 77 (1977) Petitioner had a full and fair sentencing hearing. He was precluded from presenting nothing. If, as he claims, new matters came to light, Florida provides him with the opportunity to file a Petition for Writ of Error Coram Nobis. Hallman v. State, 371 So. 2d 482 (Fla. 1979). He did this, and was

denied relief. It is to be noted that much of the background data which is alleged to be new evidence that could have been presented, was in fact presented through the testimony of Petitioner at the sentencing hearing. Thus, in many respects, it is essentially cumulative.

As to the allegedly new psychological data, Petitioner's attorney testified at the motion to vacate hearing that, had he presented such evidence, the prosecution would have come back on rebuttal and damaged any mitigating effect such evidence would have had by virtue or the presentation of the testimony of the three psychiatrists who had already examined Petitioner prior to his sentencing hearing (motion to vacate hearing, pages 42-44). Thus, while this issue teases the court, there is no merit to it.

Petitioner was not precluded from presenting any evidence. Much of the "new" evidence is cumulative. His trial attorney conceded that had such "new" evidence been presented, devastating rebuttal evidence was available for the prosecution to utilize. Petitioner had the opportunity to present the matter to the Florida Supreme Court by a Petition for Writ of Error Coram Nobis. That court denied relief, and its findings in so doing are entitled to a presumption of correctness. Marshall v. Lonberger, 32 Cr. L. 3027, USSC No. 81-420, opinion filed February 22, 1983. It cannot reasonably be concluded that there was anything more than a "possibility" that this "new" evidence would have been favorably considered by the sentencing tribunal, in light of the rebuttal evidence

that would have been presented.

But, in order to establish an ineffective counsel claim, the matter must create not only a possibility of prejudice, but it must have worked to the Petitioner's actual and substantial disadvantage. Washington v. Strickland, 693 F. 2d 1243 (5th Cir. 1982). Of course, Petitioner has not met his burden.

II. THE STATE COURTS APPLIED THE CORRECT STANDARD OF REVIEW FOR A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner challenges the appropriateness of reviewing a claim of ineffective assistance of counsel under the standard set forth in Knight v. State, 394 So. 2d 997, 1001 (Fla. 1981). Petitioner alleges he was denied effective assistance of counsel "due to his counsel's total inability to and failure to investigate Mr. Elledge's one plausible line of defense." However, as discussed earlier, counsel was familiar with the case having tried it, and was appointed to handle the re-sentencing some three weeks prior to the scheduled hearing. Further, his motion for continuance requested additional time to present sociological evidence which would have been inadmissible! Therefore, by denial of the continuance, Petitioner was precluded from presenting nothing![1]

It is significant to note that even if this Court were to reject the Knight test (based on United States v. DeCoster, 487 F. 2d 1196 (D.C. Cir. 1973) and adopt the test suggested in Washington v. Strickland, 693 F. 2d 1243 (5th Cir. 1982), Petitioner under the facts of this case would still not

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FOOTNOTE 1

1 It is noteworthy that the psychiatric report which Petitioner asserts is so compelling and significant was not prepared until late in 1982 or early in 1983. It presents largely cumulative evidence as Petitioner himself testified to much of the substance contained therein. To the extent that it presented any mitigating evidence, those contentions could have been rebutted with the testimony of the three psychiatrists who had already examined Petitioner.

meet the burden of showing actual and substantial disadvantage.

In Washington v. Strickland, the court held that to establish an ineffective counsel claim the Petitioner need only show "actual and substantial disadvantage to the course of his defense" without consideration as to whether the deficiency would have changed the outcome of the case. However, the State may still argue that in the context of all the evidence that it remains certain beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for the ineffectiveness of counsel.

Under the rule espoused in Washington v. Strickland, supra, a defendant may overturn his conviction (accomplished by proof beyond reasonable doubt), by a mere preponderance of the evidence upon collateral claims. The State can then only rebut such a showing by proof beyond a reasonable doubt that a defendant's claims did not affect the outcome of the case.

However, the Knight and DeCoster view are constitutionally correct. The view Petitioner urges focuses solely on the omission itself. That is far too narrow a focus, because it improperly allocates the burden of proof and allows a defendant to overturn a conviction on the basis of a prima facie claim in a collateral matter. That is simply not a sufficient basis to overturn a conviction established by proof beyond a reasonable doubt.

The course of justice is far better served by a rule

of law requiring a defendant attacking a conviction on the basis of a collateral matter to show that the asserted omission or error was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceeding.

CONCLUSION

Under any view, Petitioner has failed to establish actual and substantial disadvantage as a result of the denial of the requested continuance. Moreover, the issue was properly reviewed by the state courts utilizing the standards set forth in Knight v. State, supra. As the issue regarding the validity of the "outcome determinative" test is not a necessary decision in this case and the test is already before this Court in Strickland v. Washington, ___ U.S. ___, 51 U.S. L.W. 3865 (June 6, 1983) (No. 82-1554) [granting certiorari in Washington v. Strickland, 693 F. 2d 1243 (5th Cir. 1982) (Unit B) (en banc), there exists no question in dire need of answers which cannot be resolved by ruling on the Washington v. Strickland case.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CASE NO. 83-5463

WILLIAM DUANE ELLEDGE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I, MAX RUDMANN, hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have served copies of the Response To Petition For Writ Of Certiorari To The Supreme Court Of Florida, in the above-styled case to counsel for Petitioner by depositing same in the mail/courier addressed as follows:

Craig S. Barnard, Esquire
Assistant Public Defender
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All parties required to be served have been served. Done this 20TH day of October, 1983.

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